Filed 7/17/12 Pappas v. Slomowitz CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MARY LOU PAPPAS, Plaintiff and Appellant, v. LARRY SLOMOWITZ, Defendant and Respondent.	B233499 (Los Angeles County Super. Ct. No. LC088396)

APPEAL from judgment of the Superior Court of Los Angeles County. James A. Kaddo, Judge. Reversed.

Law Offices of Sheldon Rosenfield and Sheldon Rosenfield for Plaintiff and Appellant.

Greer & Associates, C. Keith Greer and David M. Watson for Defendant and Respondent.

Appellant, Mary Lou Pappas, appeals from a judgment entered upon the trial court's order granting summary judgment in favor of Respondent, Dr. Larry Slomowitz. Among her arguments, Pappas asserts that the trial court erred in concluding as a matter of law that her expert's declaration was insufficient to raise a triable issue of material fact regarding causation. As we explain more fully herein, Dr. Slomowitz did not meet his initial burden on summary judgment to demonstrate the nonexistence of a material fact concerning causation. Alternatively, assuming arguendo that Dr. Slomowitz shifted the burden to Pappas, Pappas effectively disputed this point. Thus, the trial court erred in granting judgment for Dr. Slomowitz as a matter of law. Accordingly, we reverse.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Facts

On September 4, 2007, appellant Mary Lou Pappas ("Pappas") ran to answer the telephone, and slid on the wood flooring of her home. Pappas felt a sliver of wood enter her foot. She then removed a piece of wooden splinter. However, Pappas continued to experience pain and was referred by her medical group to respondent, Dr. Larry Slomowitz ("Slomowitz"), a podiatrist. Pappas saw Dr. Slomowitz three times in September and once in October of the same year. In late September, Dr. Slomowitz ordered an MRI which was taken on October 8. During the appointment in October, Dr. Slomowitz read the MRI film and informed Pappas that there was no wood left in her foot.

Nonetheless, Pappas continued to experience pain and discomfort in her foot from the time of her injury until May 2009. For 20 months, Pappas had limited mobility and exacerbation of pain to her lower back, sciatic nerve, and right knee; she also stated that her quality of life was greatly affected

In May 2009, Pappas discovered that the MRI taken on October 8 showed there was a wooden splinter in her foot, contrary to Dr. Slomowitz's reading. In fact, Dr. Slomowitz incorrectly identified that Pappas had removed all of the wood from her foot. According to Pappas, Dr. Slomowitz never advised Pappas that wood remained in her

foot nor did he schedule a follow up appointment. Subsequently, Pappas filed a medical malpractice action against Dr. Slomowitz and her medical group on January 28, 2010.

II. Litigation

A. Dr. Slomowitz's Summary Judgment Motion

Dr. Slomowitz filed a motion for summary judgment on February 3, 2011, which included a supporting expert declaration by Dr. Travis C. Westermeyer stating that there was no breach of the standard of care by Dr. Slomowitz and that Dr. Slomowitz was not the cause of Pappas' injury. More specifically, Dr. Westermeyer stated that Dr. Slomowitz did not cause Pappas' injury because Dr. Slomowitz recommended that Pappas return for continued care and treatment and Pappas did not return.

B. Pappas' Opposition

In response, Pappas filed an opposition on February 2, 2011, supported by her declaration and the expert declaration of Dr. Michael Heaslet. In her declaration, Pappas stated that Dr. Slomowitz did not recommend that she return for follow up care. Additionally, in his declaration, Dr. Heaslet stated that it was below the standard of care to fail to make arrangements for a follow up appointment.

C. Dr. Slomowitz's Reply

In his reply brief filed February 14, 2011, Dr. Slomowitz conceded that there was an issue of material fact regarding the standard of care. However, Dr. Slomowitz argued that Pappas failed to present expert testimony that raised a triable issue of material fact regarding causation.

D. Dr. Heaslet's Amended Declaration

In response to Dr. Slomowitz's reply, Pappas filed an amended declaration from Dr. Heaslet on February 14, 2011. In his declaration, Dr. Heaslet stated that the pain suffered by Pappas was caused by the wood in her foot.

E. Dr. Slomowitz's Supplemental Reply and Dr. Westermeyer's Amended Declaration

Subsequently, on February 25, 2011, Dr. Slomowitz filed a supplemental reply[1] arguing that Pappas failed to raise a triable issue of material fact because Dr. Heaslet's declaration stated that Pappas' pain was caused by the wood not by Dr. Slomowitz. Additionally, Dr. Westermeyer's declaration stated that Pappas' injuries were not caused by Dr. Slomowitz because whether or not Dr. Slomowitz inadvertently or deliberately left a portion of the splinter in Pappas' foot, the outcome would have been the same. As to this point, Dr. Slomowitz argued that an acceptable method of treatment is to leave the splinter and let the body naturally expel the splinter on its own.

III. The Hearing and the Trial Court's Ruling

The trial court heard the motion for summary judgment on February 25, 2011, and tentatively ruled that there was a material issue of fact as to both the standard of care and causation based on the declaration of Dr. Heaslet. However, on March 28, 2011, the court ruled as a matter of law that Pappas failed to establish that there was a triable issue of material fact because Pappas' amended expert declaration did not establish that Dr. Slomowitz's actions fell below the standard of care.

DISCUSSION

Before this court, Pappas asserts that the trial court erred in granting Dr. Slomowitz's summary judgment motion. More specifically, Pappas contends the court erred in applying the wrong standard of proof for a party opposing a motion for summary judgment. Additionally, Pappas argues that the supporting expert testimony identifies a triable issue of material fact as to causation.

I. Standard of Review

We review the trial court's grant of summary judgment de novo. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 860 (*Aguilar*); *McCabe v. American Honda*

[1] The Supplemental Reply Brief was prepared on February 22 but it was not filed with the court until February 25.

Motor Co. (2002) 100 Cal.App.4th 1111, 1119.) Summary judgment is proper where the evidence shows the nonexistence of a triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar, supra*, 25 Cal.4th at p. 843.) To satisfy this burden, a defendant moving for summary judgment must establish that one or more of the elements of a cause of action cannot be established or that a complete defense exists to the cause of action. (Code Civ. Proc., § 437c, subd. (o); *Aguilar, supra*, 25 Cal. 4th at p. 850.) If the defendant meets this burden, the burden shifts to the plaintiff to show a triable issue of material fact exists as to either the particular cause of action or the proffered defense. (*Aguilar, supra*, 25 Cal.4th at p. 850.)

In determining whether the parties have met their respective burdens, the court must consider all of the evidence and all of the inferences reasonably drawn therefrom, and must view such evidence and such inferences in the light most favorable to the opposing party. (*Aguilar, supra*, 25 Cal.4th at pp. 844-845.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, 25 Cal.4th at p. 850, fn. omitted.)

II. The Trial Court Erred in Granting Summary Judgment

A. Dr. Slomowitz Failed to Demonstrate that there Was No Issue of Material Fact Regarding Causation

In any medical malpractice action, the plaintiff must establish: "(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 606.) It is undisputed that qualified medical experts may, with a proper foundation, testify on matters involving causation when the causal issue is sufficiently beyond the realm of common experience that the expert's opinion will assist the trier of fact to assess the issue of causation. (*Jennings v. Palomar Pomerado Health Systems*,

Inc. (2003) 114 Cal.App.4th 1108, 1116-1117.) An expert's opinion, however, "may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural, for then the opinion has no evidentiary value and does not assist the trier of fact." (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 123 (*Powell*).) Moreover, an expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based. (*Ibid.*)

In *Kelley v. Trunk*, this court concluded that the declaration submitted by the defendant doctor in support of his motion for summary judgment was insufficient to carry the defendant's burden in moving for summary judgment. (*Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 524 (*Kelley*).) This court found the expert declaration was insufficient because the opinions expressed in the declaration were unsupported by reasons or illuminating explanations regarding the crucial issues involved in the case. (*Ibid.*) This court further noted that the statutory standard for granting a motion for summary judgment "is not satisfied by laconic expert declarations which provide only an ultimate opinion, unsupported by reasoned explanation." (*Id.* at p. 525.) Rather, in meeting the burden of production to make a prima facie showing of the nonexistence of any genuine issue of material fact the proffered expert's declaration must be detailed and with foundation. (*Powell*, *supra*, 151 Cal.App.4th at p. 125.)

Applying the above principles, we conclude that Dr. Slomowitz failed to meet the burden of production in showing the nonexistence of a genuine issue of material fact. The only issue raised in the moving papers was causation. Dr. Westermeyer's expert declaration notes that:

> "Dr. Slomowitz recommended to Plaintiff that she return for additional follow up treatment and to review the final MRI report, but she never returned.

> Based on my review of the foregoing documents and on my education, training, and experience, it is my further opinion the Dr. Slomowitz's care and treatment in no way caused or contributed to Plaintiff's alleged injuries. Dr. Slomowitz recommended to Plaintiff that she return for continued care and treatment after October 10, 2007, but Plaintiff never returned. Thus, any alleged injury resulting from a splinter remaining in Plaintiff's left foot was caused or contributed to by Plaintiff herself by refusing to return to Dr. Slomowitz for continued follow up care and treatment."

Dr. Westermeyer's opinions are conclusory and not supported by evidence upon which he relied to reach his conclusions. He assumed that Pappas was told to return for follow up care, but this assumption lacks a sufficient evidentiary basis in the record. (*Powell, supra*, 151 Cal.App.4th at p. 123) Furthermore, Dr. Slomowitz's claim that Pappas contributed to her injury because of her failure to return for continued care would go to the issue of comparative fault. This in turn would not relieve Dr. Slomowitz of responsibility for his actions but rather would pertain to the apportionment of fault between the parties. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 314 [noting that when an injury has been caused by both a defendant's action and the plaintiff's action, the application of comparative fault principles will not operate to relieve either individual of responsibility for his or her actions, but rather will ensure that neither party will escape such responsibility].) Thus, this matter presents a triable issue of material fact regarding causation. (*Wright v. Stang Manufacturing Co.* (1997) 54 Cal.App.4th 1218, 1233 (*Wright*) ["Where a case is subject to comparative fault principles, it is inappropriate for summary judgment"].)

B. Even if the Burden was Shifted to Pappas, Pappas Adequately Discharged It

Assuming arguendo that Dr. Slomowitz met his burden, Pappas sufficiently demonstrated the existence of a material fact concerning causation which precludes summary judgment. Dr. Heaslet's declaration notes that "the pain suffered by the plaintiff in her toe area from September 4, 2007 . . . until May 2009 . . . was caused by the wood in her foot as show on the MRI taken on October 8, 2007." Dr. Heaslet further

noted that it would be below the standard of care to "not notify the plaintiff of the MRI report information and fail to follow up to make arrangements for the plaintiff to make another appointment" once Dr. Slomowitz obtained the MRI. In liberally construing this declaration, there is a factual dispute as to causation. (*Powell*, *supra*, Cal.App.4th at pp. 125-126 [in considering the sufficiency of the declaration of the plaintiff's expert in *opposition* to the defendant's summary judgment motion, "we liberally construe the declarations for the plaintiff's experts and resolve any doubts as to the propriety of granting the motion in favor of the plaintiff].)

Additionally, Pappas in her declaration disputes Dr. Slomowitz's contention; she states that she was not asked to return for follow up treatment. In fact, in Respondent's Brief, Dr. Slomowitz concedes that he "did not notify [Pappas] of the MRI determination or arrange for another appointment," refuting the nonexistence of a material fact concerning causation.

C. Dr. Slomowitz's Supplemental Argument about Acceptable Treatment

Subsequently in his Supplemental Reply Memorandum, filed the day of the hearing, Dr. Slomowitz raised a new argument to refute causation. Dr. Westermeyer's proffered opinion stated that Dr. Slomowitz's "in no way caused or contributed to Plaintiff's alleged injuries because whether or not Dr. Slomowitz inadvertently or deliberately left a portion of the splinter in Plaintiff's foot, the outcome of Plaintiff's foot would have remained the same." Once again, Dr. Westermeyer's declaration fails to meet the exacting standard set forth in *Kelley* because the opinion is conclusory and because matters of comparative fault are not proper for summary judgment disposition. (*Wright*, *supra*, 54 Cal.App.4th at p. 1233)

Even assuming that Dr. Westermeyer's opinion met the *Kelley* standard, Dr. Slomowitz's argument would still be unavailing. While the court in ruling on a summary judgment motion may in its discretion consider additional evidence, the court may only do so when the plaintiff had notice and opportunity to respond to the newly raised evidence. (See *Weiss v. Chevron, U.S.A., Inc.* (1988) 204 Cal.App.3d 1094, 1098.) Dr. Slomowitz's new argument was raised only two days before the court heard the motion.

This did not provide sufficient notice or opportunity for Pappas to respond.

In view of the foregoing, the trial court erred in granting Dr. Slomowitz's motion for summary judgment.

DISPOSITION

The judgment is reversed. Respondent is entitled to costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J. **ZELON, J.**